

## The Australian Consumer Law in the Digital Sphere

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*Recommended citation(APA):*

Cantatore, F. (2015). *The Australian Consumer Law in the Digital Sphere*. Australian Lawyers Alliance Annual QLD State Conference 2015, Gold Coast, Queensland, Australia.

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# The Australian Consumer Law in the digital sphere

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**Australian Lawyers Alliance QLD State Conference**

# The digital environment

- ❖ Online retail spending (2014) - \$16.2 billion
- ❖ Facebook Australia – January 2015 - 13,800,000 users
- ❖ International marketplace
- ❖ Increased opportunity for breaches of consumer laws

# Introduction

- ❖ Application of the Australian Consumer Law (ACL)
- ❖ Emerging issues – the Internet and Social Media
- ❖ Misleading or Deceptive Conduct (s 18)
- ❖ False or Misleading Representations about Goods or Services (s 29)
- ❖ Enforcement challenges and solutions

# The Australian Consumer Law

- ❖ **Application:** *Competition and Consumer Act (CCA)* – s 5
  - ACL includes all dealings with Australian consumers
- ❖ Applies to all industries and products except financial services
- ❖ **General prohibitions:** Misleading and deceptive conduct, unconscionable conduct and unfair contract terms
- ❖ **Misleading or deceptive conduct** provision – section 18 – strict liability
- ❖ Section 29 prohibits the making of **false or misleading representations** in relation to goods or services

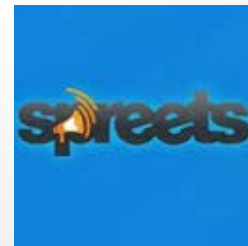
# Emerging issues

- ❖ Liability of owners of a website or Facebook page for postings on their site/page
- ❖ Innocent carriers of information – who makes the representation?
- ❖ The blurring line between information and opinion

# Discount coupon websites

ACCC action against 3 group online sites

- ❖ ***ASIC v LivingSocial Pty Ltd*** 2014 – breach of ss18, 29, 23  
<http://registers.accc.gov.au/content/index.phtml/itemId/1183806>
- ❖ ***ACCC v Scoopon Pty Ltd*** (QUD 402 of 2013) - \$1 million fine
- ❖ ***ACCC v Spreets***





# Third party comments

## ***ACCC v Allergy Pathway (No.2)*** (2011) 192FCR34

- ❖ Posting of social media comments or clips amounts to “conduct” under the ACL
- ❖ What is a reasonable timeframe?
  - ACCC – 2 key factors – size of company, number of followers
    - Social media – 24 hours a day, 7 days a week
    - Informally – remove in 24 hours



# Intermediaries

- ❖ Landmark decision – **Google Inc v ACCC** (2013) 294 ALR 404
- ❖ Sponsored ads on Google not representations
- ❖ Cited **Yorke v Lucas** (1985) 158 CLR 661
  - “passing it on for what it’s worth”



# ACL Defences

- ❖ ACL s 19 exemption – protects “information providers” -  
***Bond v Barry*** [2007] FCA 1484
- ❖ Includes:
  - publication of advertisements where the publisher did not know and had no reason to suspect the advertisements were in breach of the consumer laws
- ❖ But see ***ACCC v Channel Seven Brisbane Pty Ltd*** [2009] HCA 19

# Information or Opinion?

- ❖ ***Seafolly Pty Ltd v Madden*** (2012) 297 ALR 337
  - Facebook post - “The sincerest form of flattery?”
  - Misleading and deceptive or merely an expression of the writer’s opinion?
  - Opinions expressed recklessly as to their truth may be caught



White Sands



# Enforcement challenges

## ❖ Identity of the defendant:

- ***Keith-Smith v Williams*** [2006] EWHC 860 (QB)
- South Australian District court order - Google to disclose names of bloggers – Shane Radbone (2013)

## ❖ Obtaining redress against a foreign entity:

- Cross-border legal proceedings
- Cost of litigation to consumer

# Solutions?

- ❖ “Soft” regulation and self-regulation -  
<https://www.accc.gov.au/business/advertising-promoting-your-business/social-media>
- ❖ Consumers’ word of mouth
- ❖ Social media site management
- ❖ Need for businesses to consider:
  - education, training and monitoring
  - Billson - “flexible and responsive to new issues as they emerge”